HAIRUL AFIZUL A

v.

PP

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
ABDUL RAHMAN SEBLI JC
[CRIMINAL APPEAL NO: L41(A)-01-2008]
23 SEPTEMBER 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 12(2) - Possession of methamphetamine - Appeal against conviction - Presumptions of possession and knowledge - Whether there was failure by magistrate to consider whether presumption of knowledge rebutted - Accused's defence - Miscarriage of justice - Dangerous Drugs Act 1952, s. 37(d)* C D

CRIMINAL PROCEDURE: *Defence - Court, duty of - Appeal against conviction of possession of dangerous drugs - Rebuttal of presumption of knowledge - Whether wrong for magistrate to dismiss accused's defence as mere "theories" without considering its probabilities or improbabilities - Dangerous Drugs Act 1952, s. 37(d)* E

The appellant was charged with possession of 0.3 grams of methamphetamine ('drug'), an offence under s. 12(2) of the Dangerous Drugs Act 1952 ('Act') punishable under s. 12(3) of the Act. He was found guilty and sentenced to four months' imprisonment and fined RM6,000 in default of eight months' imprisonment. On the date and time specified in the charge, the appellant was riding a motorcycle on his way home when he was stopped and searched by a team of police officers. In the right pocket of his trousers the police found a cigarette packet containing the drug. The appellant was then arrested and at the end of the prosecution's case, the magistrate found that a *prima facie* case had been established against the appellant and duly called for his defence. The appellant gave a detailed defence, the gist of which was that he knew nothing about the drug in the cigarette packet. The magistrate dismissed the appellant's defence as mere "theories", and convicted him after finding that the appellant's defence did not cast a reasonable doubt as it did not sufficiently rebut the presumption of possession as defined under s. 37(d) of the Act. Hence, the present appeal by the appellant. F G H I

Held (allowing the appeal, and setting aside the conviction and sentence):

(1) It was clear that the magistrate found the appellant guilty on account of the fact that the appellant failed to rebut the presumption of possession. The problem with this reasoning was that it did not indicate whether the mental element of possession had been considered bearing in mind possession is only one of the two presumptions under s. 37(d) of the Act. In the first place it was wrong for the magistrate to say that possession is defined in the Act when it is only presumed. Further, if the element of knowledge was present in the magistrate's mind when he was dealing with the defence, it was not reflected in the judgment. The appellant never denied that he was in physical possession of the drug, only that he did not know that there was a drug in the cigarette packet. Thus to find that the appellant failed to rebut the presumption of possession without finding whether the presumption of knowledge had been rebutted was to deal with only half the issue. Physical possession and knowledge are two different elements, and proof of one without another cannot constitute the offence charged. Physical possession having been proved, what the magistrate should have done was to consider whether the other presumption, which was the presumption of knowledge, had been rebutted by the appellant. His failure to do so had occasioned a miscarriage of justice as it deprived the appellant of a chance to be acquitted. It was wrong for the magistrate to dismiss the appellant's defence as mere "theories" without considering its probabilities or improbabilities, as the case may be. This was particularly so where the prosecution was relying on a statutory presumption to establish knowledge, an essential element of the offence charged. Knowledge it must be remembered is only "presumed". It becomes "proved" only if the accused fails to rebut the presumption either by offering no evidence in rebuttal or, having offered evidence, the court finds it to be insufficient to rebut the presumption. Therefore, the trial court must examine the defence with care in order to determine if the accused person had succeeded in rebutting the presumption or otherwise before making any finding of guilt. The appellant's evidence, like the evidence of any other witness be it the prosecution or defence, was entitled to credence unless cogent reasons could be given as to why it ought to be rejected. It may well be that the magistrate had

disbelieved the appellant's defence in its entirety but this court was not prepared to say that had he directed his mind to the question of knowledge he would necessarily have come to the same conclusion. (paras 5, 6 & 7)

Case(s) referred to:
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 37(d)

For the appellant - Pauline Sagau; M/s Pauline Sagau & Assoc
For the respondent - Mohamed Zairi Zainal Abdin DPP; AG's Chambers

Reported by Suresh Nathan

JUDGMENT

Abdul Rahman Sebli JC:

[1] The appellant was charged in the magistrates court at the Federal Territory of Labuan with an offence specified in the following charge:

> Bahawa kamu pada 3.4.2007 jam lebih kurang 7.30 malam, bertempat di hadapan perumahan Jabatan Kerja Raya (JKR) Kpg Gersik Lama, WP Labuan, sebagai seorang yang tiada mempunyai sebarang kuasa atau kebenaran dibawah Akta Dadah Berbahaya atau mana-mana peraturan dibawahnya didapati ada dalam milik kamu dadah jenis methamphetamine (syabu) berat 0.3 gram, oleh yang demikian kamu telah melakukan kesalahan dibawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang mana kamu boleh dihukum dibawah seksyen 12(3) Akta yang sama.

[2] He claimed trial to the charge at the conclusion of which he was found guilty and sentenced to four months imprisonment and fined RM6,000 in default eight months imprisonment. Briefly the prosecution case is as follows. On the date and at the time specified in the charge the appellant was riding a motorcycle on his way home when he was stopped by a team of police officers in an operation code named "Ops Tapis". A body search was conducted on the appellant. In the right pocket of his trousers the police found a cigarette packet which on examination was found to contain a plastic packet containing a small quantity of crystalline substances later confirmed by the chemist to be 0.3 grammes of methamphetamine, a dangerous drug listed in the first schedule of

A the Dangerous Drugs Act 1952 ("the Act"). The plastic packet containing the dangerous drug was found at the base of the cigarette packet. The appellant was then placed under arrest. At the end of the prosecution case the learned magistrate found that a *prima facie* case had been established against the appellant and B duly called for the defence. On the evidence before him I have no doubt that the learned magistrate was right in calling for the defence. It is obvious that the drug was found in the appellant's custody and control when he was arrested. In this connection s. 37(d) of the Act provides:

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> 37. In all proceedings under this Act or any regulation made thereunder:
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> (d) any person who is found to have had in custody or under his control anything whatsoever containing any D dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary Is proved, be deemed to have known the nature of such drug;

E **[3]** Custody or control of any dangerous drug therefore gives rise to two presumptions, namely possession and knowledge. The word "possession" is not defined in the Act. In *Chan Pean Leon v. Public Prosecutor* [1956] 1 LNS 17 Thompson J held that for the purposes of criminal law the physical and mental element must both be present before possession is made out. Section 37(d) of F the Act presumes both against the accused person. This relieves the prosecution of the burden of proving possession and knowledge in any proceeding under the Act or any regulation made thereunder. Does "possession" in s. 37(d) of the Act include the element of knowledge? I do not think so because if it were so G there would have been no necessity to presume knowledge as well in the same provision. It must refer to physical possession only. The effect of s. 37(d) of the Act is to shift the burden to the accused person to prove on the balance of probabilities that he was not in possession of the drug and also that he had no H knowledge of the nature of the drug.

[4] When his defence was called the appellant chose to give evidence on oath. His evidence is that at the material time he was working at the haemodialysis unit of the Labuan hospital and was I familiar with a patient by the name of Romanus who was suffering from paralysis of the body. He said he had known Romanus for one year prior to his arrest. He testified that on the date of his

arrest he was at home when Romanus called him to ask him to buy fried noodles. He obliged and proceeded to Romanus' house at kampong Gersik with the fried noodle. He said he stayed at Romanus' house for about 15 minutes. Before returning home he asked for cigarette from Romanus. Romanus pointed to a "Dunhill" brand cigarette packet on the table and asked him to take it, which he did. According to him the cigarette packet had already been opened when he took it and that there were a few sticks of cigarette inside. He said when he took the cigarette packet he did not know it contained any other thing except cigarettes. He added that Romanus was also a smoker and he smoked "Dunhill" brand cigarette. Romanus was called as a defence witness. He confirmed in material particulars what the appellant said in his testimony with regard to what transpired in his house. He testified that when the appellant arrived he did not see him bringing any cigarette with him. He confirmed that the appellant did ask for cigarette before leaving his house. He also confirmed that the cigarette packet which the appellant took was already on the table inside his house. He said he did not know whose cigarette packet it was. In gist the appellant's defence is that he knew nothing about the drug in the cigarette packet. He explained that if indeed he had a guilty mind he would have turned to one of the many junctions to avoid the road block instead of proceeding straight to the spot where the road block was conducted. The learned magistrate dismissed the appellant's defence as mere "theories". In his grounds of decision the learned magistrate after referring to the evidence presented by both the prosecution and the defence made the following remark:

> At the conclusion of the trial, it was the finding of this court that the accused person's defence did not cast a reasonable doubt as It did not sufficiently rebut the presumption of possession as defined under s. 37(d) of the Dangerous Drugs Act.

[5] It is clear that the learned magistrate found the appellant guilty on account of the fact that the appellant failed to rebut the presumption of possession. The problem with this reasoning is that it does not indicate whether the mental element of possession had been considered bearing in mind possession is only one of two presumptions under s. 37(d) of the Act. In the first place it is wrong for the learned magistrate to say that possession is defined by the Act when it is only presumed. Was the element of knowledge present in the learned magistrate's mind when he was dealing with the defence? If he did it is not reflected in the

judgment. The appellant never denied that he was in physical possession of the drug. What the appellant is saying is that he did not know there was drug in the cigarette packet. Thus to find that the appellant failed to rebut the presumption of possession without finding whether the presumption of knowledge had been rebutted is to deal with only half the issue. Physical possession and knowledge are two different elements. Proof of one without the other cannot constitute the offence charged. Physical possession having been proved what the learned magistrate should have done was to consider whether the other presumption which is the presumption of knowledge had been rebutted by the appellant. In my view his failure to do so had occasioned a miscarriage of justice as it deprived the appellant of a chance to be acquitted. It is wrong for the learned magistrate to dismiss the appellant's defence as mere "theories" without considering its probabilities or improbabilities, as the case may be. This is particularly so where the prosecution is relying entirely on a statutory presumption to establish knowledge, an essential element of the offence charged. Knowledge it must be remembered is only "presumed". It becomes "proved" only if the accused fails to rebut the presumption either by offering no evidence in rebuttal or, having offered evidence the court finds it to be insufficient to rebut the presumption. It behoves therefore on the trial court to examine the defence with care in order to determine if the accused person had succeeded in rebutting the presumption or otherwise before making any finding of guilt.

[6] The appellant's evidence like the evidence of any other witness be it the prosecution or defence is entitled to credence unless cogent reasons can be given as to why it ought to be rejected. It may well be that the learned magistrate had disbelieved the appellant's defence in its entirety but I am not prepared to say for myself that had he directed his mind to the question of knowledge he would necessarily have come to the same conclusion.

[7] In the circumstances I allowed the appeal and ordered the conviction and sentence to be set aside and the fine if paid be refunded to the appellant.